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MEMORANDUM

TO: Robert Harms
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Jeffrey Burgess
Manager, Environmental Services
Lignite Vision 21 Program

FROM: Paul M. Seby

DATE: April 29, 2002

RE: Comments on EPA Dispersion Modeling Analysis

These comments are provided in response to the Lignite Vision 21 Program's request that we review the U.S. Environmental Protection Agency, Region VIII, March 5, 2002 letter sent to several stakeholders in North Dakota and Montana along with a copy of the agency's "Dispersion Modeling Analysis of PSD Class I Increment Consumption in North Dakota and Eastern Montana," dated January, 2002.

I. BACKGROUND – PSD Increments

The federal Clean Air Act (CAA) sets forth the "Prevention of Significant Deterioration" (PSD) program in CAA § 165. The PSD program involves a complex set of regulations (40 CFR Parts 51, 52, and 60) and EPA guidance documents that began with, and have evolved since the enactment of the 1970 Clean Air Act.

The current PSD program is set forth in two sets of regulations. One set is 40 CFR 52.21 which is part of the federal PSD program that applies as part of a federal implementation plan (FIP) for states that have not submitted a PSD program meeting the regulatory requirements of 40 CFR 51.16 - the other set of regulations which contains standards for PSD provisions in state

implementation plans (SIPs). North Dakota has an EPA approved PSD program, pursuant to an EPA approved SIP. EPA approved North Dakota's PSD regulations on November 2, 1979. (*See*, 44 *Federal Register* 63103) and again on September 18, 1984, after North Dakota substantially revised its state PSD regulations to be consistent with changes EPA made to the EPA PSD regulations promulgated on August 7, 1980. (49 *Federal Register* 36501 and 40 C.F.R. 52.21.) North Dakota's SIP is found at 40 CFR 52.1820 - 1835.²

The federal CAA authorizes States to designate areas within their borders as either Class I, Class II, or Class III areas. For each area "class," the CAA's PSD program defines "maximum allowable increases" in the concentration of certain air pollutants. These maximum allowable increases (or "PSD increments") vary depending on the area classifications. In the case of mandatory Class I areas, the maximum allowable increase in two pollutants that can impact visibility (i.e., PM and SO₂) is set between 2 and 25 micrograms per cubic meter ("µg/m³"), depending upon the pollutant and the time frame for the measurement (ranging between a three-hour and annual average). (CAA § 163(b)(1).) This range increases to between 19 and 512 µg/m³ for Class II areas, and 37 and 700 µg/m³ for Class III areas. (CAA §163(b)(2) and (3).) Thus, the permissible degradation in air quality in Class I areas, including mandatory Class I areas, is substantially less than the allowable degradation in the other areas (i.e., Class II areas).

The baseline PSD concentration may vary from one region to the next and one pollutant to the next. Under CAA § 163(b), the maximum permissible pollution levels in PSD areas are the baseline concentrations *plus* the PSD increments or the relevant health-based national ambient air quality standard (NAAQS) -- whichever is "lowest." States are generally free to "consume" the statutory increments for each class area, but not exceed them, subject to the following two conditions.

- (A) States cannot re-designate certain Class I areas. The areas that cannot be re-designated are the mandatory Class I areas which are the same mandatory Class I areas covered by the PSD program. States are free to re-designate a Class II area to a Class III area and thereby create a larger PSD increment for consumption, but a state cannot increase the permissible PSD increments by re-designating any mandatory Class I areas as either a Class II or Class III areas.
- (B) Under a PSD permitting program, states cannot permit the construction of a new or modified "major" source if any resulting emissions have an "adverse impact" (not "any" impact) on "air quality related values" ("AQRVs"), which includes visibility, in mandatory Class I areas. Importantly, this restriction applies even if the PSD increment is *not* exceeded. *See*, CAA § 165(d)(2)(C)(ii).

²Unlike a "delegated" PSD program where a state merely adopts text by simply incorporating the federal rules by reference and thereafter implements EPA's PSD regulations, North Dakota has an "approved" PSD program with its own independently drafted and adopted SIP rules that, satisfactory to EPA, functionally implement the federal PSD requirements in a manner consistent with the federal provisions.

Control of all other emission sources occurs as part of the state's obligation to ensure that the NAAQS and the PSD increments for the relevant class areas within the state are not exceeded. (See, CAA § 161 and 40 C.F.R. § 51.166(a)(3).)

II. UNDER THE CLEAN AIR ACT, EPA MUST DEFER TO NORTH DAKOTA'S ONGOING SIP PROCESS

We have analyzed the statutory and regulatory nature of the present issues with respect to addressing them under the Clean Air Act's federal-state process. In that regard, we are aware that, in 1975, the Supreme Court characterized the process under the CAA as one based upon a clear "division of responsibilities between the states and the federal government." See, Train v. Natural Resources Defense Council, 421 U.S. 60, 79 (1975). The Supreme Court then expressly held that the CAA expressly gave the states the initial responsibility for determining the manner in which air quality standards were to be achieved. The Court relied upon CAA § 107(a) which read then, as it does now:

Each State shall have the primary responsibility for assuring air quality within the entire geographic areas comprising such State by submitting an implementation plan which will specify *the manner* in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

CAA § 107(a), 42 U.S.C. § 7407(a) (emphasis added). In light of CAA § 107(a), the Court then construed CAA § 110:

The [CAA] gives the [EPA] no authority to question the wisdom of a State's choices of emissions limitations if they are part of a plan which satisfies the standards of §110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. Thus, *so long as the ultimate effect of a State's choice of emissions limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emissions limitations it deems best suited to its particular situation.*

Train, U.S. 421 at 79. (emphasis added)

The Supreme Court repeated Train's core principles again in Union Electric Co. v. EPA, 427 U.S. 246 (1976) namely, that CAA § 110 left to the states "the power to determine which sources would be burdened by regulations and to what extent," Id., at 269.¹ Further, the U.S. Court of Appeals for the D.C. Circuit has also recently made it clear that the 1990 Clean Air Act

¹ The Clean Air Act Amendments of 1977 added CAA § 161 setting forth the Prevention of Significant Deterioration (PSD) Program. While this was an important addition to the CAA's framework, it did not alter the state-federal relationship regarding the development of SIPs under CAA § 110.

Amendments preserved this core principle of the CAA. Indeed, "Congress did not give EPA authority to choose the control measures or mix of measures States would put in their implementation plans." Commonwealth of Virginia v. EPA, 108 F.3d 1397, 1410, *as modified on partial reh'g.*, 116 F.3d 449 (D.C. Cir. 1997).

A review of EPA's March 5, 2002 "Modeling Analysis" indicates that it is based upon several complex technical and legal assumptions. Based upon a summary technical review, EPA's analysis is missing several key pieces of information, relies heavily upon artificially high emissions levels, and is based solely on a yet-to-be-approved model. However, in assessing the sufficiency of information developed or represented by air quality models, "Congress expected EPA to use administrative good sense. If the agency did not, however, affected industry would then have cause for complaint and potential ground for relief." Alabama Power v. Costle, 626 F.2d 3423, 380. (D.C. Cir. 1979). The D.C. Circuit further noted that "The success of the [PSD] program depends heavily on realistic assessments of the pollution levels." Alabama Power, at 378. Similarly, "[EPA] is without authority to dictate to the states their policy for management of the consumption of allowable increment." Alabama Power v. Costle, 636 F.2d 323, 361 (D.C. Cir. 1979). "If...the source is an established operation, a more realistic assessment of its impact on ambient air quality level is possible and thus is directed." Alabama Power, at 379.

Under the federal Clean Air Act, states have wide latitude in choosing the means to satisfy the SIP content criteria found in § 110. Therefore, EPA should not compete with or substitute its judgment for that of the State of North Dakota – especially while North Dakota is taking diligent action under its EPA-approved PSD program. Consistent with the CAA, EPA should respect North Dakota's ongoing efforts to establish methods of emissions control sufficient to attain and maintain Clean Air Act requirements. See, Train v. NRDC, 421 U.S. 60, 79, 86-87 (1975).

III. EPA HAS IGNORED THE LEGAL EFFECT OF THE 1982 FLM CLASS I VARIANCES

While not stated, EPA's Modeling Assessment appears to take the position that the two Class I variances granted in 1982 by the FLMs for sources impacting TRNP and LWA only apply to AQRVS and that the Class I increment is still in effect. We are aware that in past correspondence, EPA has indicated the view that as a result, North Dakota is required to correct increment violations through a SIP revision on other sources.

In Part C of the CAA, Congress delineated the roles of EPA, the Federal Land Manager (FLM) and the states in issuing PSD permits for sources located near Class I areas. Under this program, EPA must define by regulation the requirements for permit applications. *See*, CAA § 161 and § 165(e). A complete PSD application must include, among other things, an air quality analysis showing compliance or noncompliance with the Class I increments. *See*, CAA § 165(c).

Upon the filing of a permit application for a source that may affect a Class I area, EPA must provide notice of the application to the FLM. The FLM may then "consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact" on the "air quality related values" (AQRVs) of such areas. *See*, CAA §

165(d)(2)(A) and (B). Where the emissions from the proposed source are *not* projected to cause or contribute to an increment exceedance, nothing more is required of the permit applicant *unless* the FLM demonstrates “to the satisfaction of the State” that the source “will have” an adverse impact on an AQRV, and the Governor of the state (or, on appeal, the President) does not overrule the FLM. *See*, CAA § 165(d)(2)(C)(ii).

By contrast, where the applicant’s emission would cause or contribute to an increment exceedance, the FLM must “certify” that *no* adverse impact on an AQRV in the Class I area would result before “the State may issue a permit.” *See*, CAA § 165(d)(2)(C)(iii). In this latter case, if the FLM denies a certification, that decision may be reversed by the President if the applicant shows “to the satisfaction of” the Governor of the state that the proposed facility will not have an adverse effect of AQRVs and the President determines that issuance of a permit is in the national interest.

When a permit is granted with a FLM certification of “no adverse impact,” the maximum allowable increase in the increment that applies to that facility is essentially the Class II increment rather than the Class I increment. *See*, CAA § 165(d)(2)(C)(iv), and N.D. Admin. Code § 33-15-15-01-(4)(j)(4)(b).

North Dakota has two major sources, the Little Knife gas plant and the Dakota Gasification plant (DGC), that are operating under FLM “no adverse impact” variances. 47 *Federal Register* 41480 (September 20, 1982); 58 *Federal Register* 13639 (March 12, 1993). Based upon correspondence we have reviewed, EPA has raised two issues with regard to these facilities: (1) whether emissions from facilities that have been granted a variance under CAA § 165 should be counted in determining whether the Class I increment is being violated; and (2) whether the stepped up FLM “no adverse impact” certification applies to facilities not granted a variance. *See*, February 1, 2002 letter from Richard Long, EPA Region VIII, to the Director of the North Dakota Department of Health.

CAA § 165 specifically establishes a stepped up alternative Class I increment for facilities granted a FLM “no adverse impact” certification. CAA § 165(d)(2)(C)(iv); N.D. Admin. Code § 33-15-15-01(4)(j)(4)(b). While omitted from EPA’s letter, the *Federal Register* notices published by the Department of Interior when granting the “no adverse impact” variances *explicitly* recognizes this alternative increment:

The “adverse impact” determination, however, provides the possible exception to the general rule that a proposed facility must not violate the class I increment described above. The adverse impact determination, which is the subject of this notice, is a site specific test which examines whether a proposed facility will, in fact, unacceptably affect the resources of a class I area. If the manager of the federal class I area determines that a proposed facility will not adversely affect the class I area, then the permitting authority may authorize the facility even though the facility’s emission may cause a violation of the class I increment. In this situation, the facility must nevertheless not exceed a revised set of class I increments established by the Act. *See* 47 FR 41480.

This alternative increment applies to Little Knife and DGC because they have been granted FLM “no adverse impact” certifications, not the Class I SO₂ increments under CAA § 163(b)(1). We are not aware of any provision in the CAA, EPA regulations or North Dakota SIP that requires any “offset” from existing facilities when a certification or variance is granted under CAA § 165 – rather those facilities are subject to the alternative increment provided for in CAA § 165(d)(2)(C)(iv) and N.D. Admin. Code § 33-15-15-01(4)(j)(4)(b), but *not* the Class I increment under CAA § 163(b)(1).

As such, SO₂ emissions from Little Knife and DGC consume increment against the alternative Class I increment under CAA § 165(d)(2)(C)(iv), and N.D. Admin. Code § 33-15-15-01(4)(j)(4)(b), but not the Class I increment under CAA § 163(b)(1). Because EPA’s Assessment fails to recognize this, it is legally deficient.

IV. CONCLUSION

Notwithstanding EPA’s assertion that the modeling “analysis is based on EPA rules and guidance as applied over the last 20-plus years,” the agency’s position is not consistent with the Clean Air Act or existing, long-standing EPA or North Dakota SIP regulations, and also not consistent with EPA’s own actions across the nation. Unless EPA intends to rescind other positions it has taken as being inconsistent with the Clean Air Act, and then propose a general national rule consistent with its modeling assessment, the EPA’s argument that North Dakota’s SIP does not comply with the Clean Air Act is not correct and should be reevaluated.